United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANT AND APPENDIX

IN THE

United States Court of Appeals

DISTRICT OF COLUMBIA.

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA
262
FILED NOV 30 1944
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CLERK

No. 8866

NATIONAL CASUALTY COMPANY, A CORPORATION, *Appellant*,

v.

FRANK A. CARDILLO, DEPUTY COMMISSIONER, DISTRICT OF COLUMBIA WORKMEN'S COMPENSATION COMMISSION, AND HARRY KITT, *Appellees*.

Appeal from the District Court of the United States for the District of Columbia.

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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IN THE

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No. 8866

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VS.

FRANK A. CARDILLO, DEPUTY COMMISSIONER, DISTRICT OF COLUMBIA WORKMEN'S COMPENSATION COMMISSION, AND HARRY KITT, *Appellees*.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

BRIEF OF APPELLANT.

JURISDICTIONAL STATEMENT.

This Court has jurisdiction in this case by reason of the provisions of Title 17, Sec. 101 of the District of Columbia Code (1940), since this is an appeal from an Order of the District Court of the United States for the District of Columbia granting a Motion to Dismiss Complaint (App. 28). The Court below had jurisdiction because of a complaint filed therein by appellant (App. 2, 3, 4) seeking injunctive relief under the provisions of Sec. 21b (Title 33, Sec. 921, U.S.C.; 44 Stat. 1436) of the Longshore-

men's and Harbor Worker's Compensation Act, made applicable to the District of Columbia by Act of Congress approved May 17, 1928 (Title 36, Sec. 50, District of Columbia Code (1940) 45 Stat. 600, c. 612, Sec. 1).

Statement of Case.

The record of testimony, as taken before the Deputy Commissioner at the formal hearing held by him in this case, disclosed the following essential facts:

Claimant contended that he suffered a small hernia in the region of the left groin on October 30, 1941, while he was employed as a salesman for his employer when he slipped as he was descending a stairway. (App. 9, 10).

That he was examined immediately thereafter by his family physician and a small hernia was found. (App. 9). That a week later he was examined by the doctor for the employer who confirmed the diagnosis of his family physician (App. 9) and who told him he should have an operation immediately. He refused to be operated on.

That claimant was afraid of an operation and bought a truss out of his own money to give him relief from the hernia. (App. 10).

That he continued to wear the truss, claiming that as time went on the hernia became more painful (App. 16), and finally, on being examined for the Army in May, 1942, he first learned that he had a double hernia, that is, a hernia on each side. (App. 17).

He then purchased a truss for the double hernia and claimed that as time went on the pain became so great that he could not stand it any longer, and went to a doctor for the purpose of having the hernias operated on. (App. 18).

Claimant continued working after his alleged first injury of October 30, 1941, and claimed that he complained to the boss, and would have to go home some times about the middle of the day. (App. 16).

That he kept working until about three days before the time of the operation on May 27th, 1943. (App. 17).

That he claimed he stopped work because the pain was so great he couldn't stand upon his feet any more (App. 18), and that this pain was in both the right and left side.

That he was operated on at the George Washington Hospital by Dr. Horowitz and his operative findings were a bilateral indirect inguinal hernia with sliding hernia to the left. (App. 18).

That he returned to work about six weeks after the operation. (App. 18).

That the claim for compensation was filed by him on October 14th, 1943.

On December 4th, 1941 the National Casualty Company filed a Notice of Controversion with the U. S. Employees' Compensation Commission, stating that the disability was not due to an accidental injury arising out of or in the course of the employment and refused to reimburse the claimant for the purchase of the first truss he bought costing $7.00. (App. 14, 15). Appellant pleaded the Statute of Limitations at the hearing before the Deputy Commissioner.

The claimant was the only witness in this case although certain data was stipulated into the record by the Deputy Commissioner.

STATUTES INVOLVED.

Section 2 (2) of the Compensation Law (Title 33, Sec. 902 (2) U.S.C.A.; 44 Stat. 1424), which reads as follows:

> "The term 'injury' means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury, and includes an injury caused by the willful act of a third person directed against an employee because of his employment."

Section 2 (10) of the Compensation Law (Title 33, Sec. 902 (10) U.S.C.A.; 44 Stat. 1424), which reads as follows:

"Disability means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment."

Section 2 (12) of the Compensation Law (Title 33, Sec. 902 (12) U.S.C.A.; 44 Stat. 1424, which reads as follows:

"Compensation means the money allowance payable to an employee or to his dependents as provided for in this Act, and includes funeral benefits provided therein".

Section 13 (a) and (b) of the Compensation Law, (Title 33, Sec. 913, (a) and (b) U.S.C.A.; 44 Stat. 1424, which reads as follows:

"(a) The right to compensation for disability under this Act shall be barred unless a claim is filed within one year after the injury, and the right to compensation for death shall be barred unless a claim therefor is filed within one year after the death, except that if payment of compensation has been made without an award on account of such injury or death a claim may be filed within one year after the date of the last payment. Such claim shall be filed with the deputy commissioner in the compensation district in which such injury or such death occurred. (b) Notwithstanding the provisions of subdivision (a) failure to file a claim within the period prescribed in such subdivision shall not be a bar to such right unless objection to such failure is made at the first hearing of such claim in which all parties in interest are given reasonable notice and opportunity to be heard.

STATEMENT OF POINTS ON WHICH APPELLANTS INTEND TO RELY.

1. The court erred in granting defendant's motion to dismiss the complaint.

2. The Court erred in dismissing the plaintiff's complaint.

SUMMARY OF ARGUMENT.

The argument submitted by the appellant in support of the points relied upon in this case might be summarized as follows:

1. In view of the decision rendered by this Court in the case of *Potomac Electric Power Company* v. *Cardillo, Deputy Commissioner,* 71 App. D. C. 163; 107 F. (2d) 962; and the decision in the case of *Fulton* v. *Hoage, Deputy Commissioner*, 64 App. D. C. 232; 77 F. (2d) 110, both involving the question as to the interpretation of Sec. 913 (a), (b) of the Longshoremen and Harbor Workers' Compensation Act, and in view of the facts in those two cases as compared to the facts in the instant case, it is of great importance to insurance carriers and employers that a decision be rendered by this Court which will govern cases similar to the instant case.

2. When an employee receives a hernia, and definitely knows that a hernia exists, can he wait, possibly for years, until *he decides* that the pain prevents him from working, and then file his claim for compensation, notwithstanding the provisions of Sections 13 (a) and (b) of the Act?

3. As there was no evidence in this case that the claimant suffered a bilateral, or double, hernia as a result of his work, was it in accordance with law for the Deputy Commissioner to make an award holding that the claimant suffered a bilateral, or double, hernia as a result of his employment, and ordering the payment for the double hernia operation performed on the claimant, where the operation for the single hernia would only be half of the cost of the double hernia.

ARGUMENT.

1. **In view of the decision rendered by this court in the case of Potomac Electric Power Company v. Cardillo, Deputy Commissioner, 71 App. D. C. 163, 107 F. (2d) 962; and the decision in the case of Fulton V. Hoage, Deputy Commissioner, 64 App. D. C. 232; 77 F. (2d) 110, both involving the question as to the interpretation of Sec. 913 (a), (b) of the Longshoremen and harbor workers compensation act, and in view of the facts in those two cases as compared to the facts in the instant case, it is of great importance to insurance carriers and employers that a decision be rendered by this court which will govern cases similar to the instant case.**

2. **When an employee receives a hernia, and definitely knows that a hernia exists, can he wait, possibly for years, until HE DECIDES that the pain prevents him from working, and then file his claim for compensation, notwithstanding the provisions of sections 913 (a) and (b) of the act?**

The Deputy Commissioner's findings of fact in the instant case were as follows: (App. 4, 5, 6):

> "That on October 30, 1941, the claimant herein was in the employ of the employer above named, whose address is 633 D Street, Northwest, Washington, District of Columbia; that the employer was subject to the provisions of an Act of Congress approved May 17, 1928, entitled "An Act to provide compensation for disability or death resulting from injury to employees in certain employments in the District of Columbia, and for other purposes"; that the liability of the employer for compensation under the said Act was insured by the National Casualty Company; that on the said day the claimant herein, while performing service as a sales-clerk for the employer and while engaged in carrying overcoats, sustained personal injury when he slipped as he was descending the stairway, suffering bilateral herniae; that a written notice of injury was not given to the employer within thirty days but that the employer had knowledge of the injury and has not been prejudiced by the lack of such written notice; that the average annual earnings of the claimant herein at the

time of the injury amounted to $1,500; that the insurance carrier declined to accept liability in the case and no medical treatment was furnished the claimant; that the claimant provided himself with a truss and continued to work; that he believed the truss would correct the herniae and he therefore did not submit to an operation until he found that the truss did not relieve him of pain and discomfort; that on May 24, 1943, the said pain became unbearable and caused the claimant to stop work; that he went to a physician, Dr. Alex Horowitz, who recommended an operation; that on May 26, 1943, the claimant was admitted to George Washington University Hospital and on May 27, 1943, an operation was performed for the relief of the bilateral herniae; that the claimant was discharged from the hospital on June 11, 1943, and he resumed his usual employment on July 5, 1943; that disability began on May 26, 1943, and the injury sustained on October 30, 1941, became compensable on May 26, 1943; that the claimant filed a claim for compensation on October 14, 1943; that the said claim was filed within one year from the date of the compensable injury; that the claim has been timely filed; that as a result of the injury the claimant was wholly disabled for a period of 5-5/7 weeks, from May 26, 1943 to July 4, 1943, inclusive, and for such temporary total disability he is entitled to 4-5/7 weeks' compensation (less the first week of disability) at the rate of $19.23 per week in the amount of $90.65; that as a further result of the injury the claimant has incurred bills for medical expenses and he is entitled to reimbursement for such bills as follows:

Truss	$ 7.00
Dr. Alex Horowitz	150.00
George Washington University Hospital	145.50
	$302.50

that nothing has been paid to the claimant as compensation or for medical bills.

Upon the foregoing findings of fact, the Deputy Commission makes the following

AWARD

That the employer, Rubin Goldstein and Son, and the insurance carrier, National Casualty Company, shall pay to the claimant herein compensation for temporary total disability for 4-5/7 weeks at the rate of $19.23 per week, from June 2, 1943, to July 4, 1943, inclusive, amounting to $90.65; and shall also reimburse the claimant in the amount of $302.50 for medical bills. * * *"

In the case of *Fulton* v. *Hoage, Deputy Commissioner, decided by this Court on March 11, 1935, 64 App. D.C. 232; 77 F. (2d) 110,* the facts were that the plaintiff was an unmarried woman, 65 years of age, and for a long time was employed by the Garfield Memorial Hospital of this city as a housekeeper. On August 11, 1931, while she was engaged in the performance of her duties at the hospital she fell upon a waxed floor and claimed injury to her right breast and left leg. She reported her injury to the hospital at the time of her fall, but did not file a claim for compensation under the Compensation Act. On November 4, 1931, she was examined by a physician in charge at the hospital, who reported that a malignant growth in the nature of a cancer had set up in her right breast, and on November 25, 1931, she gave the hospital written notice of the findings. From Aug. 11, 1931 to May 18, 1933, the claimant continued to perform her services as housekeeper at the hospital and in May, 1933, she ceased to be employed, and on December 6, 1933 she filed a claim for compensation for her injury, which she claimed was caused by the accident which occurred on August 11, 1931.

The Deputy Commissioner rejected the claim for three reasons, among which was that the claimant failed to file her claim within one year from the date of the alleged injury, as provided by Sec. 913 of the Act, and failed to establish that she was estopped by any action of the employer from filing her claim within one year, and failed

to prove that the claim was filed within one year from the date of the last payment of compensation.

In sustaining the Deputy Commissioner this Court said:

> "We are of the opinion, also, that the second ground stated by the Deputy Commissioner as a basis for his ruling is sustained by the record. It is provided by Sec. 13 of the Act. (33 U.S.C.A. Sec. 913) that the right to compensation for disability under the Act shall be barred unless claim therefore is filed with the Deputy Commissioner within one year after the injury, except that if payment of compensation has been made by the employer without an award on account of such injury, a claim may be filed within one year after the date of the last payment of such compensation. * * *"
>
> "It appears from the record that after the injury the plaintiff continued in the employment of the hospital, performing her regular duties so far as she was able, and continued to receive the same rate of pay as she had been receiving from her services before the injury. * * *"

In the case of *Potomac Electric Power Company* v. *Cardillo, Deputy Commissioner, 71 App. D.C. 163, 107 F. (2) 962,* this Court had before it a case where a claimant by the name of Kicklighter was struck on the head by the metal end of an air hose on May 24, 1935. It was clear that the accident arose out of and in the course of his employment. He was taken at once to a hospital and treated for a laceration and concussion. He left the hospital in two days, and returned to work in a week. Up to November 16, 1936, he was not disabled by reason of the accident, but after that date he worked very little. In the spring of 1937 he was informed by a psychiatrist that he was suffering from a progressive disease of the brain caused by the accident of May, 1935. On August 18, 1937, he filed a claim for compensation when he apparently first learned that the disability he was suffering from was caused from the injury of May 24, 1935.

In the above-mentioned case this Court held that the word "injury, as used in the Act, was equivalent to compensable injury," and that the limitation of one year did not begin to run until the claim to compensation arose in 1936 or 1937, and cites the case of *DeGiorgio Fruit Corporation* v. *Norton,* 93 F. (2) 119; certiorari denied, 302 U. S. 767, 58 Sup. Ct. 480; 82 Law. Ed. 596, and *Kropp* v. *Parker,* decided by the U.S. District Court of Maryland, 8 F. Sup. 290.

In the *DeGiorgio Fruit Corporation case, supra,* the claimant received an injury to his eye which disabled him for about a week, and he continued working as a longshoreman for a period of about 10 months after his injury, when he was sent to prison for 18 months. While he was in prison the injured eye pained him and it was treated by the prison authorities. He finally lost the sight of his right eye. He filed his claim for compensation over four years after the date of his injury. In this case the Court called attention to the fact that the particular question had only been adjudicated once before in the federal courts, citing the case of Kropp v. Parker, supra. Apparently the Circuit Court of Appeals for the Third Circuit was unaware that this Court had decided a similar case in the case of Fulton v. Hoage in 1935, supra, as the decision in the DeGiorgio Fruit Corporation case was rendered on September 27, 1937. In the DeGiorgio case the majority of the Court held that the term "injury" as used in Sec. 913 of the Longshoremen and Harbor Workmens' Compensation Act meant compensable injury. In this case Circuit Judge Buffington rendered a vigorous dissenting opinion, stating that the word "injury" had a clear and unambiguous meaning, and that where the meaning of a statute was clear there was no warrant for speculative construction, and if the well understood meaning of the word was followed the Court would have a designated time fixed by the statute.

The case of *Kropp* v. *Parker,* Deputy Commissioner, supra, was decided by the United States District Court for

the District of Maryland on September 29, 1934. This case involved facts somewhat similar to those in the case of *Potomac Electric Power Company* v. *Cardillo, supra.* The man received an injury to his head on March 25, 1932, which apparently caused no disability, and on July 5, 1933, a tumor was found in his brain, which was caused from the blow on the head which he received on March 25, 1932. The man had filed a claim for compensation over one year after the date of the injury, but it was held that his claim was timely filed in view of the circumstances in the case, apparently following certain decisions in the State Courts, which were cited to the effect that the employee had one year in which to file a claim after the injury had developed so as to become known as a disabling injury.

In the instant case this employee claimed to have received an injury as a result of a fall. He was immediately seen by his family doctor, and shortly thereafter by the doctor for the employer. He was told that he had a definite hernia, small in size, in the left groin, and that it should be operated on. No doubt he saw it from his description. There is no doubt that at that time he had a definite injury, that he knew it, and that the only reason he did not have it operated on, as shown by the record, was due to his fear of an operation. It was disabling as he quit work sometimes on account of the hernia. He decided to buy a truss, which probably gave him some relief, and he continued to wear the truss until he was examined for the Army about one year prior to the date of the hearing; this examination disclosed that he had a double hernia, that is, a hernia on each side. This is not a case similar to those where the claimant receives an injury which is hidden from view and which takes time to develop into a known injury, such as the types of injury received by the claimants in the Federal cases previous cited. When a person has a hernia he knows definitely that the injury is there, and that the only thing which will cure the hernia will be an operation.

It's a compensable injury at that time if it occurred as a result of his employment.

In this type of case should not the decision in the case of *Fulton* vs. *Hoage, supra,* decided by this Court in 1935, be followed in preference to the decision of the *Potomac Electric Power Company* vs. *Cardillo, supra?* If the employees who receive hernias in connection with their work are permitted to get relief by wearing a truss and continue working for a period of years without filing a claim for compensation after a report of alleged injury is submitted, there are two difficulties which will present themselves to the insurance carrier and employer:

First, the possibility that as a result of the man's failure to be operated on may produce eventually what is known as a strangulated hernia which sometimes proves fatal, in which event if he left a widow a claim for death benefits no doubt would be filed.

Second, that the case would have to be held open indefinitely until the man made up his mind to have an operation, and if he lived for a period of twenty years after the injury without having it repaired and lost no time it would mean that a reserve would have to be carried by the employer and insurance carrier on the case.

It is noted in some of the court decisions mentioned above the assertion is made that a claim for compensation cannot be filed until there is something to claim. It is contended that under the Compensation Act effective in this jurisdiction a claim for compensation can be filed any time within one year after the injury, and where the injury is hidden and the extent is unknown, and does not show itself for some time, as in cases similar to the case of the *Potomac Electric Power Company* vs. *Cardillo, supra,* that it can be filed within one year from the date that the injury becomes apparent and is traceable to the original injury and is compensable. No harm to any claimant results from filing a claim for compensation in this jurisdiction after he received an injury. It is often done, and is the common practice,

to prevent the running of the statute of limitations. This appellant belives that a decision is necessary in the instant case to clarify the law as applied particularly in hernia cases.

3. **As there was no evidence in this case that the claimant suffered a bilateral, or double, hernia as a result of his work, was it in accordance with law for the deputy commissioner to make an award holding that the claimant suffered a bilateral, or double, hernia as a result of his employment, and ordering the payment for the double hernia operation performed on the claimant, where the operation for the single hernia would only be half of the cost of the double hernia operation.**

It is believed from the evidence in the instant case that the Deputy Commissioner's decision was arbitrary and capricious in holding that this claimant received a bilateral hernia on the date mentioned in his findings of fact. There is no evidence in the record showing that following this accident this man had a bilateral hernia, and the first knowledge that he had of a bilateral hernia, as shown from the evidence, was when he was examined for the Army in May, 1942. An operation for a double hernia costs twice that for an operation for a single hernia. The period of disability, however, is approximately the same. The Deputy Commissioner's decision in awarding medical bills covering a double hernia operation, it is contended, was not based upon the evidence in the case and, therefore, was not in accordance with law.

CONCLUSION.

It is appellant's contention in this case that when the plaintiff was first examined by his doctor shortly after the date of the alleged injury he knew he had a hernia, that therefore, this knowledge brought his case with the decision of *Fulton* v. *Hoage, supra,* and it is respectfully submitted that the compensation law as defined in the *Fulton case* should have been followed by the Deputy Commissioner,

and that the lower court should have issued an order restraining the enforcement of said compensation order and award as not being in accordance with law, also, with respect to the surgical fee allowed in the case as previously explained, and requiring the Deputy Commissioner to vacate and set aside the same, and that the case should have been remanded to the Deputy Commissioner with appropriate instructions.

Accordingly the District Court erred in dismissing the complaint and its action should be reversed.

Respectfully submitted,

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801 Transportation Bldg.

APPENDIX

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IN THE

United States Court of Appeals

DISTRICT OF COLUMBIA.

No. 8866.

NATIONAL CASUALTY COMPANY, A CORPORATION, *Appellant,*

v.

FRANK A. CARDILLO, DEPUTY COMMISSIONER, DISTRICT OF COLUMBIA WORKMEN'S COMPENSATION COMMISSION, AND HARRY KITT, *Appellees.*

Appeal from the District Court of the United States for the District of Columbia.

APPENDIX TO BRIEF FOR APPELLANT.

I.

PLEADINGS, DOCKET ENTRIES AND OTHER PAPERS DESIGNATED BY APPELLANT.

1 Filed April 12, 1944,

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA.

Civil Action No. 23830.

NATIONAL CASUALTY COMPANY, 729 Investment Building, Washington, D. C., *Plaintiff*,

v.

FRANK A. CARDILLO, Deputy Commissioner, District of Columbia Workmen's Compensation Commission, 514 10th Street, N. W., Washington, D. C., *Defendant*.

Bill of Complaint for Review of Compensation Award.

1. The National Casualty Company is a body corporate having an office and doing business in the District of Columbia. The defendant, Frank A. Cardillo, is a Deputy Commissioner of the United States Compensation Commission, District of Columbia Compensation District. The jurisdiction of this court is derived from the provisions of the Longshoremen and Harbor Workers Compensation Act of March 4, 1927 (44 Stat. 1424; U. S. C. Title 33, Chapter 18, Sec. 901 et seq.) as made applicable to the District of Columbia by the Act of May 17, 1928 (45 Stat. 600, Chapter 612, Sec. 1; D. C. Code 1929, Title 19, Chapter 2, Sec. 11).

2. Plaintiff states that on, to wit, October 30, 1941, one Harry Kitt was employed by one named Rubin Goldstein at 633 D Street, N. W., Washington, D. C. as a salesman at the said Rubin Goldstein's place of business at 633 D Street, N. W.; that on that date the said Harry Kitt claims that while he was carrying a number of overcoats from the second to the first floor of the establishment and while

coming down the steps, he slipped and fell and felt a shock and pain in the region of the left groin; that the liability of said employer for compensation under the District of Columbia Compensation Act was insured at that time by the plaintiff.

3. That he reported the accident to his employer who in turn reported it to the complainant and to the Workers' Compensation Commission for the District of Columbia; that thereafter on, to wit, December 1, 1941, the complainant, National Casualty Company, controverted said
2 claim; that the said Harry Kitt lost no time from work until May 24, 1943 when he went to the George Washington Hospital where he was operated on for hernia; that he returned to work on July 5, 1943; that thereafter on October 14, 1943 the said Harry Kitt filed a claim for compensation and for reimbursement of medical expenses which the said complainant, National Casualty Company, controverted.

4. That on March 21, 1944, a hearing was had before the defendant, Frank A. Cardillo, Deputy Commissioner, and that as a result of said hearing the said Frank A. Cardillo issued an Award in favor of the claimant, copy of which is attached hereto and made a part hereof; that the complainant at all times since the filing of the claim on October 14, 1943 controverted the claim by reason of the fact that the Statute of Limitations had applied because the claim had not been filed within one year from October 30, 1941, when the accident occurred. The transcript of the testimony adduced at the hearing is also made a part hereof.

WHEREFORE the plaintiff prays:

1. That the said Frank A. Cardillo, Deputy Commissioner, be enjoined from enforcing or attempting to enforce aforesaid Award of Compensation.

2. That this Honorable Court wholly suspend or set aside said Award of said Frank A. Cardillo, Deputy Commissioner.

3. That the plaintiff have such other and further relief as is just.

NORMAN FISCHER,
Attorney for National Casualty Co.,
917 15th Street, N. W.,
Washington, D. C.

NORMAN FISCHER,
Trial Attorney.

* * * * * * * * * *

3 Filed April 12, 1944.

* * * * * * * * * *

United States Employees' Compensation Commission
District of Columbia Compensation District
Compensation Order Award of Compensation
Case No. 14728-3

In the matter of the claim for compensation under the District of Columbia Workmen's Compensation Act

HARRY KITT, *Claimant,*
v.
RUBIN GOLDSTEIN AND SON, *Employer,*
NATIONAL CASUALTY COMPANY, *Insurance Carrier.*

Such investigation in respect to the above-entitled claim having been made as is considered necessary, and a hearing having been duly held in conformity with law, the Deputy Commissioner makes the following

Findings of Fact.

That on October 30, 1941, the claimant herein was in the employ of the employer above named, whose address is 633 D Street, Northwest, Washington, District of Columbia; that the employer was subject to the provisions of an Act of Congress approved May 17, 1928, entitled "An Act to provide compensation for disability or death resulting from injury to employees in certain employments in the District of Columbia, and for other purposes"; that the

liability of the employer for compensation under the said Act was insured by the National Casualty Company; that on the said day the claimant herein, while performing service as a salesclerk for the employer and while engaged in carrying overcoats, sustained personal injury
4 when he slipped as he was descending the stairway, suffering bilateral herniae; that written notice of injury was not given to the employer within thirty days but that the employer had knowledge of the injury and has not been prejudiced by the lack of such written notice; that the average annual earnings of the claimant herein at the time of the injury amounted to $1,500; that the insurance carrier declined to accept liability in the case and no medical treatment was furnished the claimant; that the claimant provided himself with a truss and continued to work; that he believed the truss would correct the herniae and he therefore did not submit to an operation until he found that the truss did not relieve him of the pain and discomfort; that on May 24, 1943, the said pain became unbearable and caused the claimant to stop work; that he went to a physician, Dr. Alec Horwitz, who recommended an operation; that on May 26, 1943, the claimant was admitted to George Washington University Hospital and on May 27, 1943, an operation was performed for the relief of the bilateral herniae; that the claimant was discharged from the hospital on June 11, 1943, and he resumed his usual employment on July 5, 1943; that disability began on May 26, 1943, and the injury sustained on October 30, 1941, became compensable on May 26, 1943; that the claimant filed a claim for compensation on October 14, 1943; that the said claim was filed within one year from the date of the compensable injury; that the claim has been timely filed; that as a result of the injury the claimant was wholly disabled for a period of 5-5/7 weeks, from May 26, 1943, to July 4, 1943, inclusive, and for such temporary total disability he is entitled to 4-5/7 weeks' compensation (less the first week of disability) at the rate of $19.23 per week, in the amount of $90.65; that as a further result of the injury

the claimant has incurred bills for medical expenses and he is entitled to reimbursement for such bills as follows:

Truss	$ 7.00
Dr. Alec Horwitz	150.00
George Washington University Hospital	145.50
	$302.50

that nothing has been paid to the claimant as compensation or for medical bills.

Upon the foregoing findings of fact, the Deputy Commissioner makes the following

Award.

That the employer, Rubin Goldstein and Son, and the insurance carrier, National Casualty Company, shall pay to the claimant herein compensation for temporary total disability for 4-5/7 weeks at the rate of $19.23 per week, from June 2, 1943, to July 4, 1943, inclusive, amounting to $90.65; and shall also reimburse the claimant in the amount of $302.50 for medical bills.

A fee for legal services rendered the claimant in connection with this claim is approved in favor of Attorney James A. O'Shea in the amount of $50.00, such sum to constitute a lien upon and be paid out of this award.

Given under my hand at Washington, D. C. this twenty-eighth day of March 1944.

Deputy Commissioner,
District of Columbia
Compensation District.

Proof of Service.

I hereby certify that a copy of the foregoing compensation order was sent by registered mail to the claimant, the employer, the insurance carrier, attorney for the claimant, and attorney for the respondent, at the last known address of each as follows:

Mr. Harry Kitt, 5924 9th Street, N. W., Washington, D. C.

Rubin Goldstein and Son, 633 D Street, N. W., Washington, D. C.

National Casualty Company, 729 Investment Building, Washington, D. C.

James A. O'Shea, Esq., 402 6th Street, N. W., Washington, D. C.

Norman Fischer, Esq., 917 15th Street, N. W., Washington, D. C.

Deputy Commissioner.

Mailed: March 28, 1944.

* * * * * * * * * *

II.

TESTIMONY AND PROCEEDINGS.

9 The Deputy Commissioner: The hearing in this case is upon application of the insurance carrier, who has controverted the claim for compensation filed by the claimant, Harry Kitt, wherein it is alleged that on October 30, 1941, while he was employed as a salesman for the employer, Rubin Goldstein and Son, he suffered a double hernia when he slipped as he was descending a stairway.

According to the claim, disability began on May 24, 1943, and he returned to work on July 5, 1943.

On what ground is the claim controverted?

Mr. Fischer: The main point is that the employee failed to file his claim within the statutory period.

The Deputy Commissioner: You say that is the main issue? That is the only issue?

Mr. O'Shea: Yes.

Mr. Fischer: Yes, it is practically the only issue.

Mr. O'Shea: I think we can stipulate as to all the rest.

The Deputy Commissioner: The claim received here is dated August 27, 1943, and was filed October 14, 1943.

What is the claimants' statement?

Mr. O'Shea: It is our contention that we filed our claim by letter, which is in the file, in the latter part of 1941,

which, we think, would keep it within the limitation,
10 in view of that letter.

The Deputy Commissioner: Are you referring to a letter which was received here on December 4, 1941, signed by the claimant?

Mr. O'Shea: I think that is the letter.

Mr. Fischer: December 4, 1941?

The Deputy Commissioner: The letter is addressed to our Claims Examiner T. J. King.

Mr. O'Shea: That is right.

The Deputy Commissioner: And it reads as follows: Have gone by the insurance company as instructed to do but haven't received a satisfactory answer to my claim. Please let me hear from you by return mail. Signed, Harry Kitt.

Is there any evidence?

Mr. Fischer: We had no knowledge of the letter I might state until December 15, 1943, or approximately December 15, 1943.

The Deputy Commissioner: Do you have any evidence, Mr. O'Shea?

Mr. O'Shea: The only evidence is as to the sending of the letter by Mr. Kitt.

The Deputy Commissioner: All right; call him.

Mr. O'Shea: We may stipulate as to all the rest?

The Deputy Commissioner: How about wages?

Mr. Fischer: I think the record ought to show what the wages are.

11 The Deputy Commissioner: Thirty dollars a week for a six day week. I think that has been agreed upon.

Mr. O'Shea: That is right.

The Deputy Commissioner: At an informal conference. As a matter of fact, the recommendation made by the claims examiner was on that basis.

Is that correct, Mr. O'Shea?

Mr. O'Shea: That is correct.

Thereupon **Harry Kitt** the claimant herein, was called as a witness for and in his own behalf, and being then and there sworn by the Deputy Commissioner, assumed the witness stand and, upon examination, testified as follows:

Direct examination

By Mr. O'Shea:

Q. Mr. Kitt, your full name is Mr. Harry Kitt? A. That is right, sir.

Q. And you were employed by Mr. Rubin Goldstein as indicated in your claim? A. That is right, sir.

Q. Now, state the circumstances under which first made your claim to the insurance company. A. What do you want me to state?

Q. Was it made to your employer, Mr. Rubin
12 Goldstein? A. State the claim, you say?

Q. Yes. How was it brought to the attention of the insurance company? If you know. A. You mean—I don't understand.

Q. You claim that you were injured in the employ of Mr. Goldstein? A. That is right.

Q. What happened after that injury? A. What happened after the injury? I went to my family doctor, Doctor Leon Gordon, and he told me that I had a small—he told me to strip and I said I had a pain in the bottom of my belly or stomach, and I had quite a pain there, and he said: Well, I want you to strip, and I stripped, took my clothes off, and he told me that I had just a small little pea coming out, as big as a little pea.

Q. In the right groin? A. That is right.

He said it looked like it was developing into a hernia, just a small fraction there. Well, I got scared at the time and I went to the compensation doctor.

Q. Who was that? A. Doctor Sondheimer on 16th Street.

Q. When did you go to him, to the best of your knowledge? A. It wasn't very long after that. It was a very few days, I think, or probably a week.

13 By the Deputy Commissioner:

Q. November 11th? A. November 11.

I went to Doctor Sondheimer, and he told me to strip at the time and he told me, asked me what happened, and I said I slipped down the stairs carrying overcoats, and he said I had a small hernia.

Q. Where? A. On the right side, and he said: You have got to watch this, and he said: Harry, he says, I think I would have an operation immediately.

I told him that I would not accept no operation; I didn't want to have no operation at all if it was possible.

He told me then to get a truss, to go ahead to Gibson's and get it, and that the insurance company would pay for it. I went ahead with the letter from him, this slip of paper from Doctor Sondheimer to Gibson's on G Street, and they told me that they would not accept the paper. They wanted me to pay for it myself. They would not accept the doctor's certificate. They wanted me to pay for that.

They said: You will be reimbursed by the insurance company, and I paid for it. I didn't have the money, but I went out to borrow the money, which was $8.95 for the truss, and I was told I would receive tthe money.

By Mr. O'Shea:

14 Q. Did you see the doctor afterwards? A. Yes, and I never received the money. The next day or two days later—I never received any money from Doctor Sondheimer or Mr. Ricker.

Q. Where did you first see Mr. Ricker? A. If I am not mistaken, the doctor told me to see him, and he said he would not be liable for the truss, and I never received any money for the truss.

Q. Later on did you have to get another truss? A. That was much later. I thought maybe by wearing a truss I would not have to have an operation. I was very scared to have an operation. After all, nobody wants to be cut

and because it was so small I figured by wearing the truss that the hernia would disappear.

I wore the truss until I couldnt' wear it any more, and the pain was so great that I could not stand it any longer, and finally I had to get another truss.

Q. Let us get right down to it, Mr. Kitt.

Did you and Mr. Ricker have some difficulty? A. Yes. He sent for me and I went down to his office, and he abused me terribly. The way he talked to me was something awful.

Q. Did he say anything about paying the claim? A. He said nothing, but he wrote a statement and he wanted me to sign it, and he talked to me like I was under his feet.

Q. Later on did you write a letter to the company? A. I wrote a letter to the compensation.

Q. You had somebody write that letter?

By Mr. Fischer:

Q. What does he mean by saying "compensation"? You mean the compensation commission? A. Yes; the Commission, yes.

By Mr. O'Shea:

Q. You or your wife wrote the letter? A. The wife wrote the letter.

Q. With your authorization? A. That is right.

Q. What happened from then on, after you sent that letter in? Did you hear from the insurance company further? A. No; that is before. I didn't write that letter until after I had received a letter from the insurance company asking me to write a claim out, and then I wrote a letter after that. He wrote a letter after that and told me to file a claim.

M. O'Shea: You may inquire.

Cross-examination

By Mr. Fischer:

Q. Did you receive the letter from the insurance company? A. I received a letter from the insurance company about filing a claim?

Q. Have you got that letter?

16 (At this point there was a discussion had between the Deputy Commissioner and counsel for the respective parties, which, at the direction of the Deputy Commissioner, was not recorded and following which, this then occurred:)

The Deputy Commissioner: This is for the record.

After a discussion with the claimant the claimant desired to straighten out the statement.

By the Deputy Commissioner:

Q. What is your present statement now as to whether or not you received a letter from the insurance company? A. That is right, sir.

Q. What is your statement? What do you say about that? Did you or did you not receive a letter from the insurance company? A. From, I think, Mr. Ricker, I received a letter. I don't recall, sir. I can't recall off hand.

By Mr. O'Shea:

Q. If you are not sure, please say so. A. I am not sure.

By Mr. Fischer:

Q. As a matter of fact, the letter that you received—you did receive a letter from the Compensation Commission; is that correct? A. I did receive a letter from the compensation.

Q. Did you receive a letter from the Compensation
17 Commission? A. Yes. sir.

Q. And in addition to that did you receive a letter from Mr. Ricker? A. I think so; I am not positive.

Q. Then you are mistaken when you say you got a letter from the insurance company; isn't that correct? A. I can't recall. I don't want to say anything that I can't recall.

Q. You made a definite statement that you did receive a letter from Mr. Ricker. A. He answered the letter. He answered that letter by something that I received, but I don't remember what.

After all, that kind of comes to my mind. It is sometime back and I can't really recall.

I remember having received some letter but I don't remember what exactly, to be frank with you. I want to be honest about the matter, and I don't want to put something in that I don't remember.

Q. Was the only time you ever saw the insurance company the time that you went to see Mr. Ricker when he attempted to get you to sign a statement? A. I think it was, sir—in the Investment Building.

Q. Did you ever write to the insurance company or to Mr. Ricker?

Mr. O'Shea: When?

18 Mr. Fischer: At any time.

The Witness: Did I ever write to the insurance company? You mean the National Casualty Company?

By Mr. Fischer:

Q. Yes, or to Mr. Ricker? A. I don't think so.

Q. And the only time you ever saw them was in December, 1941? A. I think so; at his office.

Q. At his office? That is the only time you ever saw him? A. That is right, sir.

Q. And you had no communication with them until the time that you filed your claim, October 14, 1943, when you filed your claim with this Commission, and thereafter we had a conference here? Is that correct? A. Well, the doctor told me when—

Q. (interposing) I am not talking about the doctor.

I am asking whether the only time since the time you saw Mr. Ricker in his office in the Investment Building, that the next time you saw him was after you filed your claim, which was October 14, 1943? Is that correct? A. wasn't it in Mr. Ricker's office?

Q. And you didn't communicate with him? A. No.

Q. So as to clear that, you saw Mr. Ricker in December, 1941?

Mr. O'Shea: I don't think he said that.

Mr. Fischer: He said he saw Mr. Ricker in his office.

The Witness: He sent a letter to me.

The Deputy Commissioner: Yes; he said that.

By Mr. Fischer:

Q. You saw him at that time? A. Yes. I don't know whether that particular time, sir, but I know I seen him.

The Deputy Commissioner: Let me straighten the details out. I think we will get along better.

The file seem to be clear and unless objected to we will accept these as the facts in the case.

For the record, under the letter received in this office on November 21, 1941, the claims examiner, Mr. King, wrote a letter to the claimant requesting him to call at this office for an interview, which he did on December 1, 1941.

On that date the claimant was sent by the claims examiner to Mr. Ricker for information as to whether he, Mr. Ricker, would accept the case.

Thereafter a letter was received, signed by the claimant, on December 4, 1941, the letter previously referred to. On December 4, 1941, the same day, Mr. Ricker, the general agent for the National Casualty Company, filed a notice of controversion, stating that the disability was not due to an accidental injury arising out of and in the course of the employment.

On January 6, 1942, the claimant called at this office in response to another request, at which time he stated that

he had purchased a truss at Gibson's for $7 and that Mr. Ricker had refused to reimburse him.

The Claimant also stated that he had continued work, and if an operation should become necessary, he desired to be informed of his rights. He was advised that a hearing would not be held in the case until he would have the operation performed.

Thereafter nothing further was heard from the claimant until a letter was received from his attorney, Mr. James O'Shea, dated August 27, 1943, advising that the operation was performed on May 27, 1942.

Mr. O'Shea: It should be 1943.

The Deputy Commissioner: 1943?

Mr. O'Shea: Yes; it should be 1943.

The Deputy Commissioner: And thereafter, on October 14, 1943, a claim on the official form DCCA 303 was filed. I think that is the procedure up to the time of the filing of the official claim.

Is there any objection to that?

Mr. Fischer: Not at all.

Mr. O'Shea: No.

Mr. Fischer: I have no further questions.

Examination by the Deputy Commissioner.

21 By the Deputy Commissioner:

Q. Mr. Kitt, I understand now that you continued doing work after your accident of October 30, 1941; is that correct? A. That is correct, sir; with the aid of a truss. I could not stand without the truss.

Mr. O'Shea: You have answered the question. Just answer the question the Commissioner asks you.

By the Deputy Commissioner:

Q. How did you continue to progress after you continued working? Did you get better or worse? A. I continued to get worse.

Q. In what way? A. Pains; so when I would stand up for a while I would have pains in here.

Q. Show me where. A. In here (indicating).

Q. In the right groin? A. Yes, and I would have to sit down.

Q. Did you complain of any discomfort in the left groin? A. No; never.

Q. You didn't? A. No.

Mr. Fischer: I am sure if you get the report of Dr. Horowitz, I think it was—I have no report of it. I would like to see it.

22 The Deputy Commissioner: Doctor Horowitz?

Mr. Fischer: The doctor who performed the operation.

The Deputy Commissioner: I have a report dated January 31, 1944.

Mr. O'Shea: That is right.

By the Deputy Commissioner:

Q. Now, tell me what happened. You kept on working until when? A. I kept working and I used to complain to the boss. I would have to go home about the middle of the day. I would tell the boss: I can't stand on my feet, and if I would reach up for a suit of clothes, it would pain me.

Q. What happened finally? A. I thought by wearing a truss I would not have to resort to an operation. I didn't want to resort to any operation at all.

I thought if I would wear the truss it would reduce the strain on me, that I would just have to keep wearing the truss.

Q. Then did you change your opinion with respect to that? A. I have changed my opinion after it got worse, and I went to get examined for the Army, the physical.

Q. When was that? A. I don't recall when it was.

Q. How long before the operation? A. Well, it was be-

fore—it was before the operation.

23 Q. How long before the operation? A. About a year, I would say; about a year.

Q. About a year before the operation? A. Yes. I went for a physical examination. I am talking about the Army.

By Mr. O'Shea:

Q. When was that? That is what we want to know. A. Approximately a year ago.

By the Deputy Commissioner:

Q. What did you want to say about it? A. I wanted to say they found I had a double hernia, not just a single one.

When I went there to be examined for my physical to be inducted in the Army they found I had a double hernia, not a single; they found it to be on the left side too.

Q. Let us go back to your employment.

You kept on working until when? A. Until the time of the operation.

Q. Give me the time. I am not supposed to know anything about this. A. The time?

Q. When did you stop work? A. Just about a week before the time of the operation.

By Mr. O'Shea:

24 Q. What date was that? A. That was—

By the Deputy Commissioner:

Q. (interposing) If you were operated on May 27, 1943— A. (interposing) I went home just a week before that.

Q. You stopped work about a week before that? A. Not a week. I beg your pardon.

About three days before. I went on Monday, I think, and was operated on Thursday, I went home on Monday.

Q. The Monday before the operation? A. That is right.

Q. That would be May 24? A. That is right, sir.

Q. Why did you stop work? A. The pains was so great that I could not stand it any more. I could not stand on my feet. I used to complain to the boss.

Q. Just answer the question. Why did you stop it? A. The pain was too great.

Q. Where? A. In my groin.

Q. In the right side? A. That is right, sir. Right and left side at that time.

Q. Right and left? A. Yes.

Q. What did you do about it? A. I went to Dr.
25 Horowitz, and he examined me and told me it would be necessary for an operation.

Q. Did you arrange for the operation? A. That is right, sir.

Q. What hospital did you go to? A. Georgetown—I mean, George Washington.

Q. And you were operated on May 27, 1943? A. Yes, sir.

By Mr. O'Shea:

Q. The 26th or the 27th? Which was it now? A. To be exact, the 27th.

By the Deputy Commissioner:

Q. Doctor Horowitz states the 27th. A. That is right. I think Thursday; it was on a Thursday morning.

The Deputy Commissioner: The report of Dr. Horowitz, dated October 26, 1943, states as follows:

"Mr. Harry Kitt was operated on by me on May 27, 1943, at the George Washington University Hospital.

"The operative findings were as follows: Bilateral indirect inguinal hernia with sliding hernia to the left. Closure was made with cotton No. 8 double.

"Dismissed from the hospital seventeen days later."

By the Deputy Commissioner:

Q. When did you go back to work after the oper-
26 ation? A. About six weeks. I am not saying exactly; about six weeks after the operation.

Q. On your claim you state: Came back to work week of July 5, 1943. A. About that.

Q. Did you have any expenses in connection with the hernia and the operation? A. Yes; well, I had expenses of a nurse and the anesthesia, the anesthetist you call it, $25 for the anesthesia, the anesthetist.

By Mr. O'Shea:

Q. You gave the bills to me? A. Yes, sir.

Mr. O'Shea: The bills are in the file, Mr. Commissioner.

The Deputy Commissioner: Have you seen them, Mr. Fischer?

There is one submitted for $150 for the operation, and another from George Washington Hospital totalling $145.50.

Mr. Fischer: I want to test the reasonableness of these bills, your Honor.

Mr. O'Shea: By him?

Mr. Fischer: No.

By the Deputy Commissioner:

Q. Has your bill for the truss ever been paid? A. No, sir.

Q. So you have an additional bill for $7 for the
27 truss? A. No; the bill was $7.95.

One bill was $25. I got another truss. I got a double truss from the Kloman Instrument Company on 18th Street.

Q. Do you have a bill for that? A. I don't but I can get it; for $25.

Q. The first truss was for the right side only? A. Yes.

Q. Who recommended the double truss? A. When I went to the hospital to get examined to be inducted in the Army, they told me I had a double hernia, and I realized the reason I wasn't feeling so well was that, and I thought if I would get a double truss I would feel better, and I went to the Kloman Instrument Company and they examined me and said I had to have a double truss instead of a single one. They have a doctor there at the Kloman Instrument Company on 18th and Eye Street.

Q. Your claim is for compensation for the six week period of disability and for the bills incurred; is that correct? A. That is right, sir.

The Deputy Commissioner: Are there any other questions?

Mr. O'Shea: May I say to your Honor that there is a letter under date of January 11, 1944, from Mr. King in which he advised me that these bills were sent to Mr. Ricker of the National Casualty Company, and they were returned, all bills as mentioned, and they were returned to Mr. King with a statement.

28 The Deputy Commissioner: To Mr. King?

Mr. O'Shea: Yes, sir, with the statement that Mr. Ricker wasn't interested in the payment of the above bills.

Further cross-examination

By Mr. Fischer:

Q. Do I understand, Mr. Kitt, that you were operated on for double hernia? A. That is right.

Q. When did you first commerce to feel the effects of the hernia on the left side? A. I didn't know I had it, sir. I didn't know it until after I went up to be examined by the Army doctor.

I didn't know it then until he wrote on the card. I noticed it when they give you a paper to be examined.

Q. Just give me the time. You don't have to go into a long explanation.

You didn't know it until the time you were examined by the Army doctor? A. That is right; at Georgetown Hospital.

Q. At the time you first had this hernia that was solely on the right side; is that correct? A. That is right.

Q. You don't know where the hernia came from that came on the left side; what caused it? A. I have

29 no idea, sir.

Mr. Fischer: That is all.

The Deputy Commissioner: Are you contesting the left hernia as being the result of this accident?

Mr. Fischer: I just wanted to find out.

(At this point there was a discussion had between the Deputy Commissioner and counsel for the respective parties, which, at the direction of the Deputy Commissioner, was not recorded and following which, this then occurred:)

The Deputy Commissioner: Are there any further questions?

Mr. O'Shea: No.

(Thereupon the witness was excused and retired from the witness stand.)

The Deputy Commissioner: Is there any other evidence?

Mr. O'Shea: I have his employer here if you want to use him. I don't think it is necessary.

Mr. Fischer: I think that is all, except that I want to make this statement:

That insofar as the insurance company is concerned, they have had no correspondence and no word from Mr. Kitt from the time he first came into the insurance company's office in December, until after he filed his claim with the Commission on October 14, 1943. So we never heard anything of the case from December, 1941, until after October 14, 1943.

Mr. O'Shea: Did you see this letter?

Mr. Fischer: This is a letter from Mr. Goldstein. We had no communication or word from Mr. Kitt, the claimant in this case, from that period of time until after he filed his claim.

Mr. O'Shea: In that connection, I would like to read this letter into the record.

Mr. Fischer: I don't want to object to it.

The Deputy Commissioner: May I see it, please?

Mr. O'Shea: Yes (handing a paper writing to the Deputy Commissioner).

The Deputy Commissioner: That letter doesn't help me, Mr. O'Shea.

I find from the evidence adduced today that the letter referred to, received here on December 4, 1941, signed by the claimant, does not constitute a claim in as much as the wording of that letter is not included in the claim for compensation.

However, the claim filed on October 14, 1943, is timely filed and filed within one year from the date of the compensable injury.

This claimant had no claim to file until he was disabled. That is the time when his right accrues—at the time when the injury becomes compensable. If he had filed a claim before that time it would be meaningless. There is nothing to claim until he has lost time and incurred medical expenses. He had no right to file for compensation until this disability began.

He filed a claim on October 14, 1943, which was filed within one year from the date of injury or the date
31 of compensable injury.

This is in accordance with a decision of the United States Circuit Court of Appeals for the Third Circuit in the case of DiGiorgio Fruit Corporation and Aetna Life Insurance Company against Norton, Deputy Commissioner, No. 6458, Third Compensation District.

Mr. Fischer: Have you the citation?

The Deputy Commissioner: No, but it is the Circuit Court of Appeals for the Third District, Case No. 6458, March Term, 1937. In its decision the Court stressed the fact "that the period of limitation in which the claim must be filed begins to run from the time the injury becomes apparent in a final definite way and is therefore compensable."

The Court also made a survey—there are various Court decisions cited and conflicting opinions—and it stated:

"Though there is this divergence in terms used, nevertheless, there is a unanimity of idea to be expressed,

namely, that the employee's claim is not barred until one year from the time in which the injury has reached a definote, culminating stage and one which, being reasonably apparent, is therefore compensable."

The Court also called attention to the meaning of the statutory words "within one year after the injury," and also as to the meaning of the word "injury."

It says this:

32 "That in common use and in the common understanding, the words 'after the injury' have a clear unambiguous meaning, and where the meaning of a statute is clear, there is no warrant for speculative consideration."

Mr. O'Shea: What Circuit was that from? The Third Circuit?

The Deputy Commissioner: Yes.

The definition of the word "injury" in our law, of course, is inability to earn the wages that he received at the time of the injury. There is a distinction between the word "accident" and the term "injury" as used in our law. It is not necessarily the same thing. Accident and injury may be concurrent where disability starts immediately from the date of the accident.

But it is the opinion of the Court, as well as the position taken by this office, that with respect to applications of the Statute of Limitations if a claim is filed within a year from the time of the compensable injury that it is timely filed.

In view of that an award will be made for compensation for the claimant for four and five-sevenths weeks at the rate of $19.23 a week, in the amount of $90.65, from May 26, 1943 to July 5, 1943, inclusive, less the first week of disability.

An award is also made for reimbursement to the claimant for his medical expenses incurred as follows:

$150 for the doctor's bill.

Mr. O'Shea: He questioned the reasonableness of these bills.

33 The Deputy Commissioner: What is your statement with reference to that? The usual fee for a bilateral hernia is $150.

Mr. O'Shea: It is.

Mr. Fischer: That is the usual fee?

The Deputy Commissioner: $75 for a single hernia and $150 for a double hernia.

Mr. Fischer: If that is the usual fee, I am satisfied. In other words, I want the fees confirmed regardless of what the doctor charged; I want the fees confirmed as reasonable fees by this office.

The Deputy Commissioner: That is considered reasonable. That is the usual charge.

The other bill is for $145.50, which was paid to the George Washington University Hospital for hospitalization and care, which includes the anesthetic and other laboratory examinations.

And also for the bill for the truss in the amount of $7, which is the only bill I have before me.

Is there anything else?

Mr. Fischer: Will that be written up?

The Deputy Commissioner: Yes, it will and an order will be sent out.

Are you requesting a fee, Mr. O'Shea?

Mr. O'Shea: Yes, I think I am entitled to a reasonable fee.

34 The Deputy Commissioner: The fee will be fixed and set in the compensation order which will be filed.

* * * * * * * * * *

III.

ADDITIONAL PAPERS.

35 Filed April 25, 1944.

Motion to Dismiss Complaint.

Now comes the defendant, Frank A. Cardillo, deputy commissioner, United States Employees' Compensation Commission, by his attorneys and moves this Honorable Court to dismiss the complaint for injunction filed herein for the following reasons:

1. That the complaint filed herein does not state a cause of action and does not entitle plaintiff to any relief under the law, nor does said complaint state a claim against dedendant upon which relief can be granted;

2. That it appears from the complaint, including the transcript of the testimony which was made a part thereof, that the claim for compensation under the District of Columbia Workmen's Compensation Law was filed within the time provided by section 13(a) of said law;

3. For such other good and sufficient reasons as may be shown.

36 EDWARD M. CURRAN,
United States Attorney.

DANIEL B. MAHER,
Assistant United States Attorney, Attorneys for Defendant Cardillo.

I hereby certify that on the 25 day of April, 1944, I served a copy of the foregoing motion to dismiss, together with notice and memorandum of points and authorities in support thereof, on Mr. Norman Fischer, attorney for

plaintiff, by mailing copies thereof to said attorney at 917 15th Street, N. W., Washington, D. C.

DANIEL B. MAHER,
Assistant United States Attorney, Attorney for Defendant Cardillo.

* * * * * * * * * *

37 Filed May 6, 1944.

Consent Order Permitting Intervention as Party Defendant.

This cause coming on to be heard at this term of Court for the intervention of Harry Kitt as party defendant, and by consent of the parties hereto, it is by the Court this 6th day of May, 1944.

ORDERED that Harry Kitt be, and he hereby is permitted to intervene in the above-entitled cause as party defendant.

JAS. W. MORRIS,
Justice.

Consented to:

NORMAN FISCHER,
Attorney for Plaintiff.

DANIEL B. MAHER,
Attorney for Defendant,
Frank A. Cardillo, Deputy Commissioner.

* * * * * * * * * *

38 Filed May 12, 1944.

Motion of Harry Kitt to Dismiss Bill.

Now comes the defendant, Harry Kitt, by his attorneys, and moves this Honorable Court to dismiss the bill of complaint filed herein for the following among other reasons:

1. That the bill of complaint herein does not state a

cause of action and does not entitle plaintiff to relief in law or in equity.

2. That it appears from the bill of complaint, with exhibits, including the transcript of testimony taken before the Deputy Commissioner and made a part of the bill of complaint, that the findings of fact and award of the Deputy Commissioner, as contained in the order for compensation complained of in the bill filed herein and annexed thereto, are supported by competent evidence. Therefore, under the law, said findings of fact of the Deputy Commissioner should be recognized by the Court as final and conclusive.

3. That it appears from the bill of complaint, including the transcript of testimony made a part thereof, that Harry Kitt, sustained injuries on, to wit, October 30, 1941, which arose out of and in the course of his employment and that said findings of fact are supported by the testimony adduced before the Deputy Commissioner.

39 4. That the compensation order complained of is in all respects in accordance with law, as shown by the transcript of record hereby made a part hereof, and that said findings of fact of the Deputy Commissioner are to be regarded as final and conclusive and not subject to judicial review.

5. For such other and further reasons as are apparent on the fact of the record.

JAMES A. O'SHEA,
Attorney for Harry Kitt.
402 6th Street, N. W.

Norman E. Fischer, Esquire,
917 15th Street, N. W.,
Attorney for Plaintiff.

United States Attorney,
District Court of the U. S. for D. C.,
Attorney for Defendant, Frank A. Cardillo.

Please take notice that the rules of this Court require that if you oppose the granting of this motion, you shall,

within five (5) days from the date of service of a copy of the attached motion upon you, or such further time as the Court may grant, or as the parties to this suit may agree upon, file in reply with the Clerk of this Court a statement of the points and authorities upon which you rely, and serve a copy thereof upon counsel for defendant.

JAMES A. O'SHEA

A copy of the foregoing Motion was mailed post-paid to Norman E. Fischer, Esquire, Attorney for Plaintiffs, on the 3rd day of May, 1944.

JAMES A. O'SHEA

Service of copy of foregoing Motion acknowledged this 5th day of May, 1944.

DANIEL B. MAHER,
United States Attorney.

* * * * * * * * * *

40 Filed June 7, 1944.

Order and Judgment Granting Motion to Dismiss Complaint.

This action came on to be heard upon a motion of defendants to dismiss the complaint filed herewith and upon consideration thereof, it is this 7th day of June, 1944,

ADJUDGED, ORDERED AND DECREED, that the motion to dismiss the complaint herein be, and is hereby granted, and the complaint filed herein be, and the same hereby is, dismissed.

JAS. W. MORRIS,
Justice.

No objection as to form:
NORMAN FISCHER,
Attorney for Plaintiff.

* * * * * * * * * *

41 Filed Aug. 19, 1944.

Notice of Appeal.

Notice is hereby given this 19th day of August, 1944, that The National Casualty Company, a corporation, plaintiff herein hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 7th day of June, 1944 in favor of Frank A. Cardillo, Deputy Comm. and Harry Kitt, against said National Casualty Company, a corporation.

JAMES E. McCABE,
801 Transportation Bldg.,
Attorney for Plaintiff

* * * * * * * * * *

42 Filed Sept. 15, 1944.

Statement of Points on Which Appellant Intends to Rely.

Comes now the plaintiff, the National Casualty Company, a corporation, and assign for review on appeal, errors committed by the trial court as follows:

1. The Court erred in granting defendant's motion to dismiss the complaint.

2. The Court erred in dismissing the plaintiff's complaint.

JAMES E. McCABE,
Attorney for Plaintiff,
Transportation Bldg.,
Washington, D. C.

Service of a copy of the above statement is hereby acknowledged this 15th day of September, 1944.

DANIEL B. MAHER,
Attorney for Defendant,
Frank A. Cardillo.

JAMES A. O'SHEA,
Attorney for Intervening Defendant Harry Kitt.

* * * * * * * * * *

No. 8866

United States Court of Appeals

DISTRICT OF COLUMBIA

NATIONAL CASUALTY COMPANY, A CORPORATION, APPELLANT

v.

FRANK A. CARDILLO, DEPUTY COMMISSIONER, DISTRICT OF COLUMBIA WORKMEN'S COMPENSATION ACT, AND HARRY KITT, APPELLEES

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

UNITED STATES
RT OF APPEALS FOR THE
STRICT OF COLUMBIA

ED JAN 11 1945

Joseph W. Stewart

CLERK

BRIEF FOR APPELLEES

EDWARD M. CURRAN,
United States Attorney,

DANIEL B. MAHER,
Assistant United States Attorney,
Attorneys for Appellee Cardillo.

JAMES A. O'SHEA,
Attorney for Appellee Harry Kitt.

WARD E. BOOTE,
Chief Counsel,
United States Employees' Compensation Commission.

HERBERT P. MILLER,
Assistant Chief Counsel,
Of Counsel.

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United States Court of Appeals

DISTRICT OF COLUMBIA

No. 8866

NATIONAL CASUALTY COMPANY, A CORPORATION, APPELLANT

v.

FRANK A. CARDILLO, DEPUTY COMMISSIONER, DISTRICT OF COLUMBIA WORKMEN'S COMPENSATION ACT, AND HARRY KITT, APPELLEES

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEES

COUNTERSTATEMENT OF THE CASE

This case arises upon a complaint for judicial review of administrative action in the form of a compensation order filed on March 28, 1944, by the appellee Frank A. Cardillo, as deputy commissioner, United States Employees' Compensation Commission, in which he awarded workmen's compensation to Harry Kitt (hereinafter called "employee") for injuries sustained while employed by Rubin Goldstein and Son. The appellant, National Casualty Company, was the insurance carrier for the employer at the time of injury. Such compensation order was filed by Deputy Commissioner Cardillo pursuant to the provisions of the compensation law in force in the District of Columbia; namely, the Longshoremen's and Harbor Workers' Compensation Act of March 4, 1927 (44 Stat. 1424; U. S. C. Title 33, c. 18, secs. 901, *et seq.*), as made applicable to the District of Columbia by the Act of May 17, 1928 (45 Stat. 600, c. 612, sec. 1; D. C. Code (1940), Title 36, c. 5, sec. 1), which will be referred to hereinafter as

the "compensation law." Page references to "appendix" refer to the appendix in appellant's brief.

The compensation order referred to was filed after formal hearing. The record of testimony (transcript of testimony) taken at the hearing upon the compensation claim is incorporated in appellant's appendix. This testimony shows as follows: That on October 30, 1941, the employee, while performing service as a salesclerk for his employer and while engaged in carrying overcoats, slipped as he was descending a stairway, sustaining bilateral herniae; that the employee thereafter went to his own doctor, who found a small hernia (App. 9); that on November 11, 1941, he went to the appellant's physician, Dr. Sondheimer, who gave him a "slip of paper" to get a truss (App. 10); that the representative of the appellant insurance carrier, a Mr. Ricker, to whom claimant applied for reimbursement of the cost of the truss, refused reimbursement (App. 10, 11); that the employee wrote to Compensation Commission on December 4, 1941, stating that he had gone to the insurance company (as the claims examiner at the Compensation Commission had previously instructed him to do (App. 14)), but had not "received a satisfactory answer to my claim," and requested a reply (App. 8); that on the same day, December 4, 1941, the insurance company filed with the deputy commissioner a notice controverting the right to compensation, stating that the disability was not "due to an accidental injury arising out of and in the course of the employment" (App. 14); that employee was informed, on January 6, 1942, at the office of the deputy commissioner, that a hearing would not be held in the case until he would have the operation performed (App. 14, 15); that on August 27, 1943, employee's attorney informed the deputy commissioner by letter that an operation had been performed on May 27, 1943 (App. 15); that the employee had continued to work after the accident, with the aid of a truss (App. 15), but the condition grew worse until it was so painful that the employee could not continue at work, and he ceased work three days before the operation (App. 15, 16, 17). The formal claim for *compensation for disability* was filed on October 14, 1943 (App. 15).

At the hearing upon the claim, the *sole* issue raised by the insurance company (the appellant) was that the claim was *not timely filed* (App. 7). The deputy commissioner made a finding, in the compensation order complained of, that the claim was filed within the period prescribed by section 13 of the compensation law, and made an award of compensation for the period of temporary disability, namely, five and five-sevenths weeks, less the first week (for which no compensation was payable, because the period of total disability did not exceed forty-nine days; see section 6 (a) of the compensation law). The compensation order, containing the complete findings of the deputy commissioner, is printed beginning at page 4 of the appendix.

The insurance company, the appellant, thereafter instituted a proceeding for judicial review of the compensation order, alleging that it was not in accordance with law on the ground that the claim for compensation was not filed within the "statute of limitations"; *no other issue was raised* in the lower court. Motions to dismiss the complaint were filed on behalf of the deputy commissioner and the employee. The motions were heard before Mr. Justice Morris, who, by order entered on June 7, 1944, granted the motions and dismissed the complaint (App. 28). It is from that order that the present appeal was taken.

STATUTES INVOLVED

Section 2 (10) of the Longshoremen's and Harbor Workers' Compensation Act (33 U. S. C. A. sec. 902 (10)) which provides as follows:

> "Disability" means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment.

Section 2 (12) of the Longshoremen's and Harbor Workers' Compensation Act (33 U. S. C. A. sec. 902 (12)) which provides as follows:

> "Compensation" means the money allowance payable to an employee or to his dependents as provided for in this Act, and includes funeral benefits provided therein.

Section 6 (a) of the Longshoremen's and Harbor Workers' Compensation Act (33 U. S. C. A. sec. 906 (a)) which provides as follows:

> No compensation shall be allowed for the first seven days of the disability, except the benefits provided for in section 7: *Provided, however,* That in case the injury results in disability of more than forty-nine days, the compensation shall be allowed from the date of the disability.

Section 13 (a) of the Longshoremen's and Harbor Workers' Compensation Act (33 U. S. C. A. sec. 913 (a)) which provides as follows:

> The right to compensation for disability under this Act shall be barred unless a claim therefor is filed within one year after the injury, and the right to compensation for death shall be barred unless a claim therefor is filed within one year after the death, except that if payment of compensation has been made without an award on account of such injury or death a claim may be filed within one year after the date of the last payment. Such claim shall be filed with the deputy commissioner in the compensation district in which such injury or such death occurred.

Section 19 (a) of the Longshoremen's and Harbors Workers' Compensation Act (33 U. S. C. A. sec. 919 (a)) which provides as follows:

> Subject to the provisions of section 13 a claim for compensation may be filed with the deputy commissioner in accordance with regulations prescribed by the commission at any time after the first seven days of disability following any injury, or at any time after death, and the deputy commissioner shall have full power and authority to hear and determine all questions in respect of such claim.

QUESTION INVOLVED

The only question involved is whether the claim for compensation for disability was filed within the period prescribed by section 13 (a) of the compensation law.

SUMMARY OF ARGUMENT

Point I. The claim for compensation was timely filed, because it was filed within one year from the date the employee had the right to claim compensation for disability (as "compensation" and "disability" are defined in the statute).

Point II. All matters other than the single question whether the claim for compensation was timely filed, are extraneous to this appeal. Thus Point 3, and parts of Points Nos. 1 and 2 stated in appellant's brief are beyond the record or otherwise are irrelevant.

ARGUMENT

POINT I

The claim for compensation was timely filed

At the hearing before the deputy commissioner the issue raised and heard was that the employee "failed to file his claim within the statutory period" (App. 7). In the lower court the only complaint in the bill was as to the "Statute of Limitations" (not amplified to show the precise statutory provision relied upon) as barring the claim (App. 3).

Here we have the case of an employee sustaining industrial herniae on October 30, 1941, of such character as not immediately resulting in "disability" (as defined in section 2 (10) of the compensation law, *supra*). The employee worked until May 24, 1943, when he first actually became disabled for work, and three days later underwent an operation. There is no question in this case as to knowledge on the part of the employer or his insurance carrier that the injury occurred as related above. The only complaint is in substance that the employee waited too long before filing his claim (it was filed just under two years from the date of the *accident*).

The appellees' whole position is this: the employee could not claim "compensation for disability" (quoting from section 13 (a), *supra*—the limitation section), because he had no "disability" (defined in the compensation law, section 2 (10), *supra*, as meaning "incapacity because of injury *to earn the wages* which the employee was receiving, etc."), so as to claim "compensation" (defined in the compensation law, section 2 (12),

supra, as meaning "the money allowance payable to an employee * * * as provided for in this Act"), until after he was obliged to quit work on May 24, 1943. His claim, filed October 14, 1943, was well within one year from the date the *"right to compensation for disability"* (section 13 (a)) accrued. He filed his claim as directed by section 19 (a) of the law, which prescribes such filing "at any time *after* the first seven days of *disability following* any injury." The relevant findings of the deputy commissioner *"that the said claim was filed within one year from the date of the compensable injury,"* and *"that the claim has been timely filed"* (App. 5), are therefore in accordance with law. The claim was filed within one year from the date of *compensable injury.*

The question of law in this case has been passed upon by this Honorable Court. The decision in *Potomac Electric Power Company* v. *Cardillo, deputy commissioner,* 71 App. D. C. 163, 107 F. (2d) 962 (1939), agreed in the construction of the compensation law above contended for. The cogent parts of the opinion are as follows:

> On May 24, 1935, Kicklighter was struck on the head by the metal end of an air hose. The accident arose out of and in the course of his employment. He was taken at once to Emergency Hospital, and treated for laceration and concussion. *He left the hospital in two days, and returned to work in a week. At that time he had no claim to compensation, for the first seven days of disability are not compensable.* Up to November 16, 1936, or thereabouts, he was not again disabled by reason of the accident. After that date he worked very little. In the spring of 1937, he was first informed by a psychiatrist that he was suffering from a progressive disease of the brain caused by the accident of May 1935. On August 18, 1937, he filed a claim for compensation. At the hearing doctors disagreed on the question whether he was, after November 16, 1936, disabled by reason of the 1935 accident. The record contains evidence which supports the finding in his favor, and other evidence which would support a contrary finding. It fol-

lows that the actual finding is conclusive. As we have said repeatedly, the weight of the evidence is for the deputy commissioner and not for the courts.

The compensation act provides, in section 13 (a), that the right to compensation for disability "shall be barred unless a claim therefor is filed within one year after the injury, and the right to compensation for death shall be barred unless a claim therefor is filed within one year after the death." Appellant contends that "injury" is here equivalent to "accident," and that the limitation began to run in 1935. *We think that "injury" is here equivalent to "compensable injury," and that the limitation did not begin to run until the claim to compensation arose in 1936 or 1937. An intent to bar compensation claims before they arise cannot fairly be imputed to Congress.* No reason appears for treating death claims and disability claims differently in this respect, or for thinking that the statute does treat them differently. Cases are collected in *Di Giorgio Fruit Corporation* v. *Norton,* 3 Cir., 93 F. 2d 119, certiorari denied, 302 U. S. 767, 58 S. Ct. 480, 82 L. Ed. 596, and *Kropp* v. *Parker,* D. C., 8 F. Supp. 290, both of which are in point. We need not decide whether the limitation began to run in 1936, when Kicklighter became disabled, or in 1937, when he learned that his disability was caused by the accident of 1935. On *either* view, his claim was timely. [Emphasis supplied.]

This Honorable Court cited as in point the case of *Di Giorgio Fruit Corporation* v. *Norton, deputy commissioner,* 93 F. (2d) 119, cert. den. 302 U. S. 767. The *Di Giorgio* case arose under the same provision of law as is now before this Honorable Court. In that case the third circuit court of appeals held that the time for filing claim begins to run, not from the date of the accident, but from the time when the injury culminates into compensable disability. In that case the employee sustained an injury to his eye on July 25, 1932, and it was not until several years later (at which later time claim was filed) that the injury culminated in loss of sight of the eye. It was contended

in that case, as in the present case, that the phrase "within one year after the injury" in section 13 of the compensation law barred any claim not filed within one year after the date of the *accident*. This contention the court rejected, holding that the claim was timely filed. In its opinion the court said in part:

> As might be expected, the state courts differ in their precise treatment of this question. Some decisions treat the period of limitation of time in which the claim must be filed as running from the date upon which the injury culminates; some, from the date upon which the injury becomes apparent. Other decisions hold the period of limitation runs from the date upon which the injury becomes compensable. Though there is this divergence in terms used, nonetheless there is a unanimity of idea to be expressed, namely, that the employee's claim is not barred until one year from the time in which the injury has reached a definite, culminating stage and one which, being reasonably apparent, is therefore compensable. Decisions of the state courts with such rulings are *Case of Brown,* 228 Mass. 31, 116 N. E. 897; *Hornbrook-Price Co.* v. *Stewart,* 66 Ind. App. 400, 118 N. E. 315; *Johansen* v. *Union Stock Yards Co.,* 99 Neb. 328, 156 N. W. 511; *Simon* v. *Cathroe Co.,* 101 Neb. 211, 162 N. W. 633; *Esposito* v. *Marlin-Rockwell Corp.,* 96 Conn. 414, 418, 114 A. 92; *Hines* v. *Norwalk Lock Co.,* 100 Conn. 533, 540, 124 A. 17; *Fee* v. *Department of Labor,* 151 Wash. 337, 275 P. 741; *Guderian* v. *Sterling Sugar & Railway Company,* 151 La. 59, 91 So. 546.
>
> * * * * *
>
> The weight of authority of the state courts is clearly against the contentions of the appellants.

Similarly, in the case of *Kropp* v. *Parker, deputy commissioner,* 8 F. Supp. 290 (D. C. Md. 1934), cited as in point by this Honorable Court in the *Potomac Electric Power Company* case, the court held that the time for filing claim under the Longshoremen's Act does not begin to run until the injury results in disability entitling the claimant to compensation. In the latter case the accident occurred on March 25, 1932, but

the employee did not suffer "disability," that is, he did not suffer incapacity to earn wages by reason of the accident until June 3, 1933, and it was on the latter date that his right to compensation accrued. His claim filed June 22, 1933, within the year from the date the right to compensation accrued, but more than a year after the accident, was held timely filed. District Judge Chesnut in his opinion in that case said:

> In the absence of any direct federal decisions it is natural to turn to state court decisions under similar provisions in Workmen's Compensation Laws. The federal statute is modeled upon the New York law (*Wheeling Corrugating Co.* v. *McManigal,* 41 F. (2d) 593, 595, C. C. A. 4), which as enacted in 1914 used the word "injury" in its similar limitation section (Laws, 1914, C. 41, sec. 28) but in 1918 the act was amended and the word "accident" substituted for "injury" (Laws, 1918, C. 634, sec. 4). I have not noticed any reported decision construing the New York Act as originally worded in this respect. But in other states, under statutes, *similarly worded,* the great majority of the decisions interpret and apply the word "injury" in the sense of "compensable injury," and therefore in numerous cases involving facts substantially similar to those here existing, it has been held the claim was not barred by the statute. It has been held in Connecticut, Minnesota, Louisiana, Washington, Nebraska, Indiana, and Arizona. The contrary has been held in Michigan and North Dakota.

The Court, after citing numerous authorities, concluded that:

> In the absence of any legislative history to the contrary, it seems reasonable to conclude that Congress in adopting the particular wording of the section intended that it should be construed *in accordance with this great weight of authority in state courts.* It is also clear that the Act should be liberally construed. *DeWald* v. *B. & O. R. R. Co.,* 71 F. (2d) 810 (C. C. A. 4, June 11, 1934); *Rothschild & Co.* v. *Marshall,* 44 F. (2d) 546 (C. C. A. 9). [Italics supplied.]

The following State cases are in accord with the principle of law set forth in the foregoing opinions:

Esposito v. *Marlin Rockwell Corp.*, 96 Conn. 414, 114 A. 92;
Johansen v. *Union Stockyards Co.*, 99 Neb. 328, 156 N. W. 511;
Simon v. *Cathroe Co.*, 101 Neb. 211, 162 N. W. 633;
Stolp v. Department of Labor and Industries, 138 Wash. 685, 245 P. 20;
Guderian v. *Sterling Sugar & Railway Co.*, 151 La. 59, 91 So. 546;
Bergeron's Case, 243 Mass. 366, 137 N. E. 739;
Brown's Case, 228 Mass. 31, 116 N. E. 897;
Hornbrook-Price Co. v. *Stewart*, 66 Ind. App. 400, 118 N. E. 315;
McKenna Case, 117 Me. 179, 103 Atl. 69;
Clausen v. *Minnesota Steel Co.*, 242 N. W. 397, 186 Minn. 80;
Hines v. *Norwalk Lock Co.*, 100 Conn. 553, 124 A. 17;
Hustus' Case, 123 Me. 428, 123 A. 514;
Fogg v. *Woodcock Lunch*, 134 A. 636, 125 Me. 524 (1926).

In *Esposito* v. *Marlin-Rockwell Corp.*, *supra*, wherein as in the instant case, the employee *sustained a hernia* some time between March 3, 1919, and May 6 1919, but continued to work until January 10, 1920, when he was obliged to cease work, the defendants urged that claim for compensation had not been made within one year from the date of injury, as required by the statute. In holding that the term "date of injury" referred not to the date of the accident or occurrence which injured the employee but to the date when the injury became compensable and hence a subject of a claim for compensation, the court said:

> Our statutes provide that a claim for compensation does not arise until after the incapacity of the employee for a period of more than seven days from earning full wages at his customary employment, compensation to begin at the expiration of the first seven days of in-

> capacity. *Until such period of incapacity has passed, no enforceable claim for compensation has accrued, and no claim for compensation could be made.*
>
> Therefore, when Sec. 5360 provides that a written notice of a claim for compensation must be made within one year from the *date of the injury,* the claim spoken of must be a *compensable claim* under Sec. 5348, as there is no other kind of a claim for compensation referred to in the Compensation Act.
>
> *There is no provision* in the Act *for filing a claim for compensation* for compensable results of an accident or occurrence *which the employee believes may arise in the future.* Until the seven days of incapacity have occurred there is no "claim for compensation."
>
> *A compensable injury is an injury for which compensation is payable, and the date of such an injury is not the time of the accident or occurrence causing injury, but the time under Sec. 5348 when the right to compensation accrues.* [Italics supplied.]

The employee in the present case could not have filed a claim for compensation, which would have entitled him to the money allowance called "compensation," prior to 7 days following the date when he was obliged to quit work, May 24, 1943, because up to the time of quitting, he was continuously able to earn the same wages, and therefore had no "right to compensation for disability,"—no "compensation" to claim. To require an injured employee to file a claim, before right to compensation for disability accrues, would apparently impose a harsh construction of the statute. The Longshoremen's Act in its national and local application should be liberally construed in favor of the injured employee. *Baltimore & Philadelphia Steamboat Co.* v. *Norton, deputy commissioner,* 284 U. S. 408 (1932); *Fidelity & Casualty Co. of New York* v. *Burris,* 61 App. D. C. 228, 59 F. (2d) 1042 (1932); *Associated General Contractors of America, Inc., et al.* v. *Cardillo, deputy commissioner,* 70 App. D. C. 303, 106 F. (2d) 327 (1939); *DeWald* v. *Baltimore & O. R. R. Co.,* 71 F. (2d) 810 (C. C. A. 4, 1934), cert. den. October 8, 1934, 293 U. S. 581.

In the case of *Salt Lake City* v. *Industrial Commission,* 93 Utah 510, 74 Pac. (2d) 657, the court aptly stated the case as follows:

> Holding that the statute begins to run from the time of accident instead of from the time of compensable disability or loss, in effect makes the statute begin to run before the cause of action accrues. In negligence cases the cause of action arises from the negligence which causes the accident and therefore the statute begins to run from the time the negligence operated on plaintiff, which would be at the time of the accident. But no such rule applies in compensation cases. Compensation does not depend upon negligence. * * * Not until there is an accident and injury and a disability or loss from the injury does the duty to pay arise. A mere accident does not impose the duty to pay. Accident plus injury therefrom does not impose the duty. But accident plus injury which results in disability or loss gives rise to the duty to pay. * * *

That the construction which we are here advocating and which has been heretofore approved by the courts respecting the time for filing of compensation claims under section 13 of the Act is proper appears from the record of the bill before it became law (S. 3170 69th Congress, First Session; 67 Congressional Record 4119). When the bill was originally introduced in the Senate, section 14 of the bill containing provisions which were eventually embodied in section 13 of the Act provided that:

> The right to claim compensation shall be barred unless within two years *after the accident* * * * a claim for compensation shall be filed with the deputy commissioner * * *.

A comparison of this provision of the bill with the language ultimately enacted into law shows that Congress reduced the statute period from two years to one year and also substituted the word "injury" for the word "accident". Although there is no explanation of the change, it seems reasonably clear that the change would not have been made unless Congress intended

that "injury" should have a meaning different from that of "accident". Of more significance still is the fact that though the New York law as it existed at the time of the enactment of the Longshoremen's Act (the New York law was adopted almost verbatim in the Longshoremen's Act) provided that the time for filing claim should run from the "accident" Congress by the purposeful change referred to above declined to adopt such provision in the Federal Act, but instead provided that the time should begin to run from the date of "injury".

It may be argued by appellant (or the court may raise the inquiry) whether since the employee had a right to medical treatment, or perhaps right to recover for the truss he bought, that he had an earlier "right to compensation",—thus there may be earlier invoking of the limitation provision in section 13 (a). The right of the employee to be furnished with medical treatment, as distinguished from the right to compensation for disability, has no bearing whatever upon the present issue for several reasons. In the first place, the medical benefit is provided in section 7, the compensation for disability in section 8, and the compensation for death in section 9 of the compensation law (33 U. S. C. A. 907, 908, 909). Each of these sections is independent of the other, and separate benefits are provided under each. In connection with the medical benefits under section 7, it is *not* necessary for the employee to file a claim for such benefits. The limitation provisions of section 13 (a) barring claims, do not apply to benefits prescribed by such section 7. Under section 7 the initiative is placed directly upon the employer to "furnish", and not the employee to "claim" those benefits. Where the employer fails to "furnish" such benefits, the employee may obtain the necessary services at the expense of the employer. Moreover, the medical benefits under section 7 are not "compensation for disability" within the meaning of section 14 (m) of the Act (fixing total compensation payable under the Act at the sum of $7,500). The Supreme Court of the United States in the recent decision of *Marshall, deputy commissioner* v. *Pletz,* 317 U. S. 607, relates the year limitation provision of section 13 (a) of the law solely to "compensation for disability", holding in substance that the year limitation *does not apply to the medical benefits pre-*

scribed by section 7. A portion of the opinion bearing upon this point is quoted below:

> We hold, however, that the furnishing of medical aid is not the "payment of compensation" mentioned in section 13 (a). * * * Section 4 of the Act, it is true, refers "to the compensation payable under secs. 7, 8, and 9." It may be argued that as 7 is the section dealing with medical care, Congress meant to include such care within the term "compensation." In the normal case, however, the insurer defrays the expense of medical care but does not pay the injured employee anything on account of such care. Only if the employer and insurer omit to furnish such care can the employee procure it for himself and then obtain from the deputy commissioner an award to reimburse him for what he has spent.
>
> In the light of all the provisions of the Act, we are persuaded that the terms "payment" and "compensation" used in sec. 13 (a) refer to the periodic money payments to be made to the employee.

Judicial recognition that the limitation provisions of the Act do not apply to medical benefits may also be found in *Union Stevedoring Corporation* v. *Norton, deputy commissioner,* 98 F. (2d) 1012 (C. C. A. 3, 1938). In the case of *Cardillo, deputy commissioner* v. *Liberty Mutual Insurance Company,* 69 App. D. C. 330, 101 F. (2d) 254, this Honorable Court recognized that medical benefits are not "compensation" and refused to consider the cost of medical benefits furnished to be counted in applying the $7,500 as "total compensation" under section 14 (m).

Decisions consistent with the severability feature of sections 7, 8, and 9 of the compensation law are as follows:

Hitt v. *Cardillo, deputy commissioner,* 76 App. D. C. 334, 131 F. (2d) 233, cert. den. 318 U. S. 770 (1942);

Norton, deputy commissioner v. *Travelers Insurance Company,* 105 F. (2d) 122 (C. C. A. 3, 1939);

International Mercantile Marine Co. v. *Lowe, deputy commissioner,* 93 F. (2d) 663 (C. C. A. 2, 1938).

Even though an employee should lose his right to compensation for disability because of a limitation provision of the law, such loss would not affect the right of the employee to continued medical treatment necessitated by the injury; *Union Stevedoring Corporation* v. *Norton, deputy commissioner, supra.*

Point II

All matters other than the single question whether the claim for compensation was timely filed are extraneous to this appeal

Appellant's argument is divided into three parts: Part numbered 1 as set out in its summary of argument, does not state a proposition of law but merely contains a *petition* that a decision be rendered by this court which will govern similar cases. Part numbered 2 contains merely a *question* whether the employee can wait until he decides when it is appropriate for him to file claim for compensation "notwithstanding the provisions of section 13 (a) and (b) of the Act," thus begging the question. Part numbered 3 of the appellant's argument raises a new issue, whether the employee really suffered bilateral herniae and whether the employer should have paid for a double hernia operation, the allegation being that there is no evidence that the employee suffered such bilateral herniae.

Appellant's Points 1 and 2 are argued together, and the answer to the argument is contained in the following topic in this brief. Point 3, as to whether there was evidence that the employee suffered a hernia will not be argued for the reason that this point is not in the case. There is no record basis upon which to question the finding of the deputy commissioner that the employee suffered bilateral herniae as a result of the accident and there is no record basis for questioning the amount of the medical costs ordered reimbursed.

There was only one issue raised before the deputy commissioner. It was, whether the employee *failed to file his claim within the statutory period* (App. 7). There was *no contest* in respect to the bilateral herniae as attributable to the injury

of October 30, 1941 (this is very obvious from page 21 of the appendix). There was *no contest* in respect to the amount of the cost for repair of the bilateral hernia. Counsel for the appellant before the deputy commissioner indicated his satisfaction as to the amount of the bill and did not object thereto (App. 24). The complaint in the lower court also raised no question in respect to Point 3.

It is settled law that if an issue is not raised before the deputy commissioner at the time the case is heard, the issue cannot subsequently be availed of either in the lower court or upon appeal, and all issues not raised before the deputy commissioner are considered waived. In point are: *Parker, deputy commissioner,* v. *Motor Boat Sales, Inc.,* 314 U. S. 244 (1941); *Maryland Casualty Company* v. *Cardillo, deputy commissioner, and Mary Najjum,* 107 F. (2d) 959 (App. D. C. 1939); *Southern Shipping Co.* v. *Lawson, deputy commissioner,* 5 F. Supp. 321 (D. C. Fla. 1933); *Metropolitan Casualty Insurance Co.* v. *Hoage, deputy commissioner,* 67 App. D. C. 54, 89 F. (2d) 798 (1937); *Liberty Stevedoring Co., Inc.,* v. *Cardillo, deputy commissioner,* 18 F. Supp. 729 (D. C. N. Y. 1937); *Grain Handling Co., Inc.* v. *McManigal, deputy commissioner,* 23 F. Supp. 748 (D. C. N. Y. 1938); *State Treasurer* v. *West Side Trucking Co.,* 198 App. Div. 432, affd. 233 N. Y. 202, 135 N. E. 544; *Burmester* v. *De Lucia,* 263 N. Y. 315, 189 N. E. 231 (1934).

CRITIQUE OF APPELLANT'S ARGUMENT

The burden of the appellant's argument is (1) that the employee should have undergone an operation upon learning of his hernia, and that failure to have the operation—not in this case, as an operation had been performed—may eventually produce a strangulated hernia which sometimes proves fatal, giving rise to a claim for death benefits in cases in general, and (2) that such failure may require a case to be held open indefinitely, causing the insurance carrier to maintain a long reserve on a case. (This argument of the appellant is not related to the provisions of the law which the court apparently is asked to construe, but is related to considerations *dehors* the statute. The appellant would like to have the statute construed

strictly so as to accomplish ends of possible economic advantage to insurance carriers, whether the result should otherwise be socially desirable or in exact accord with justice as regards employees.)

The appellant assumes a rather anomalous and inconsistent position in asserting that the claimant should have received an operation promptly. This appellant certainly did nothing to encourage an operation, nor did it comply with the obligation imposed upon the employer under section 7 of the law, which is to *furnish* medical, hospital and other treatment, and which it was a statutory and contractual duty to furnish.

The employee was injured October 30, 1941. Instead of complying with the law by making certain that claimant received or was offered proper and adequate treatment, the employee was left to shift for himself. He first went to his family doctor (App. 9); then, on November 11, 1941, he *went* (the record does not show "sent") to the insurance company's physician, who told him to get a truss at the insurance company's expense, and gave him a slip for this purpose (the physician, as carrier's agent, would hardly have thus sought to obligate the carrier if he had not thought the case compensable). The employee sought to purchase a truss at the carrier's expense but was informed by the company furnishing the truss that he would have to pay for it himself (App. 10). He stated that he paid $8.95 for a truss and was told that the carrier would not recognize liability for the cost of the truss (App. 10). Employee testified that Mr. Ricker (insurance carrier's representative) sent for him and that "I went down to his office and he abused me terribly," and said nothing about paying his claim (App. 11). On December 1, 1941, the employee had been sent to Mr. Ricker by the office of the duputy commissioner to ascertain whether the carrier "would accept the case." On December 4, 1941, the carrier filed notice that it would controvert the right to compensation on the ground that "disability was not due to an accidental injury arising out of and in the course of the employment" (App. 14). On January 6, 1942, the employee appeared at the office of the deputy commissioner stating that he had purchased a truss and that Mr. Ricker had refused to reimburse him. He inquired of his

right in case an operation should become necessary and was advised that a hearing would not be held until he would have the operation. The operation was performed May 27, 1943 (App. 15).

The employee testified that he thought that the use of a truss would not require resort to operation (App. 16). He worked until May 24, 1943, when the pain became too great (App. 17). He arranged for his own operation (App. 18); bills for expenses incurred were sent to the carrier and were returned with the statement by carrier's representative that the latter "wasn't interested in the payment of these * * * bills" (App. 20). It appears therefore that instead of receiving the cooperation of the carrier, the employee, as he testified, received abuse, and refusal to pay for a truss which the carrier's own physician told him to get. This can hardly be stated to be evidence of a desire or intention faithfully to comply with the provisions of section 7 of the compensation law requiring the furnishing of medical treatment. If there was any failure to obtain a prompt operation, the failure was apparently initiated in the first instance by neglecting to furnish the employee with the treatment the law requires to be furnished, and by the apparent lack of interest the employee was accorded when he sought to ascertain whether the carrier would accept the case as a compensable one.

The carrier therefore is seeking to benefit by failure on the part of the employee to obtain prompt operation, a circumstance in which the carrier participated by its negative reaction.

In its brief the appellant makes the following statement:

> When a person has a hernia he knows definitely that the injury is there, and that the only thing which will cure the hernia would be an operation (Br. p. 11).

This statement is open to a number of criticisms. In the first place, the employee was initially advised only of a small hernia described by him "as big as a little pea" (App. 9). While an employee may be aware that some physical tearing has taken place producing a hernia, knowledge of this fact does not necessarily imply knowledge that he has a condition which requires immediate operation, since many employees go through life

with small herniae well retained by trusses, causing no disability for work which gives rise to a claim for compensation, and with little or no physical discomfort. The generality which the appellant makes (that the only thing which will cure a hernia is an operation and that an injured person knows that fact) is therefore far from an accurate statement. This employee testified that he thought, with the use of a truss, he could avoid resort to an operation. This may be accepted as a statement of the common belief not only of this workman, but many others as well, for they do know that trusses are successfully used in the retention of a hernia, and moreover, it is general knowledge that trusses and other non-surgical treatments are commonly and widely advertised as, and believed to be, successful alternates for operations. Furthermore, there are certain psychological factors which may be very weighty in respect to the choice of workmen who may be ill-informed as to the chances of recovery or the percentage of successful repairs of herniae. Employees when ill-informed, no doubt are prone to over-emphasize the risks involved and see only the bad effects of operations.

The only manner in which a question of unreasonable refusal to accept an operation could arise under the compensation law would be in connection with an application under section 7 (a) of the law for suspension of payment of compensation for *unreasonable refusal* to submit to medical or surgical treatment. This section can come into play only where there has been a refusal, after an offer—a situation not present in this case. Moreover, the deputy commissioner would have to determine whether the refusal was unreasonable. (This determination involves a number of factors and in any event a refusal could not be characterized as "unreasonable" unless it has been shown that there was an offer, a refusal, and evidence that the employee was sufficiently apprised of the facts concerning the probable effects of the proffered treatment to enable him to make an intelligent choice, and thus be charged with the responsibility of unreasonable refusal. A refusal could hardly be considered unreasonable if the employee is unaware of sound medical opinion in respect to elements of danger, or lack of danger, to life, limb, and health inherent in the particular treat-

ment or operation. An employee possibly misled as to the virtues of conservative treatment, whether influenced through advertising or common belief, and having an exaggerated or inherent fear of operations, could hardly be said to exhibit unreasonableness in rejecting an operation, unless his misapprehension, fears, and false beliefs should be sought to be counter-balanced by intelligent medical advice and he be given opportunity to reason upon the problem before him, *after having been fully apprised.*)

It is *possible* of course, as common knowledge informs us, that a hernia, if not repaired, may strangulate and increase disability, or cause death, but the same *possibility* of dire consequences is apparently inherent in nearly every pathological condition. On the other hand, common knowledge also informs us that many retained hernias never strangulate and that conservative treatment, by truss or other method, is reliable because doctors do prescribe trusses and other conservative treatment for hernias, *as in the present case.* The question whether the possibility of strangulated hernia as increasing liability should influence the result in the present case may be answered in the negative on the ground that *prima facie* this argument addresses itself directly to a question of an employee's unreasonable refusal to accept medical or hospital treatment, a question which can arise under the compensation law only under section 7 (a) where it is dealt with, and such section is not involved in the present appeal.

The second point raised by the appellant relates to the necessity of a carrier maintaining a reserve on a hernia case for the payment of benefits, with the suggestion that such a reserve (in a hypothetical case) may be carried for a period of 20 years.

The Act at no place conditions an employee's right to compensation by the length of time an insurance carrier has to maintain a reserve to pay future benefits. It would be anomalous to relate the payment of benefits to an insurance carrier's reserve.

It is a fact, of which the appellant is aware, that insurance carriers in most states under the law are required as to workmen's compensation to maintain a *statutory reserve* for a

period of three or four years after respective yearly premiums are earned, of a fixed percentage (usually 65%) of all earned workmen's compensation premiums. This reserve is required whether there should be one pending case or a thousand pending cases, and whether the claims are closed or open, and, depending upon the State law involved, the reserve is there and it was no doubt there in respect to the present case (for the case was less than two years old when the claim was filed by the employee). The "reserve" argument is otherwise without force because in any event there is neither (1) limitation of time, nor (2) limitation of amount, with respect to the obligation to pay medical and surgical expenses under the local compensation law. In the present case the medical costs were more than three times the amount of compensation ($90.65 compensation; $302.50 medical and other expenses). Since the year limitation in section 13 (a) of the compensation law does *not* apply in respect to the medical and other benefits provided for by section 7 of the law, and medical benefits are not included in the $7,500 maximum compensation (sec. 14 (m)), all carriers alike must "reserve" for actual or contingent future medical liability in all cases under the Act. Appellant therefore could not escape considering the necessity of a "reserve" for medical benefits regardless of whether or when the claim for compensation is filed.

Under the varying and manifold provisions of the compensation laws in this country, insurance carriers must consider many kinds of contingent or future liabilities. The fixing of insurance reserves for contingent liability is a common practice, and the "reserving" of funds to defray liability for medical treatment, future or contingent, under the present compensation law, including compensation for possible future disability, offers no special problem, nor does it differ in character from other contingencies reserved for under State laws.

There is still another argument to dispose of appellant's assertion in respect to interminable reserves, and that is:—where an employee (having nothing presently to claim as compensation) should in after years have a basis to claim compensation, or believe that he has one, the burden of the employee necessarily becomes, by the passing of time, progres-

sively more difficult to carry. It is in substance an *evidence* burden; that is, he would have to show that his initial disability (perhaps initially involving slight physical impairment) has *without any intervening efficient cause* progressed to a point of sufficient severity to become disabling. Taking the illustration offered by appellant, of an employee waiting 20 years to file claim, it may well be that such employee would have an evidence burden almost impossible to carry to establish disability, at such late date, from an industrial accident 20 years earlier. In the first place, he would have to show no intervening "disability" (loss of wages) attributable to the injury (which would have given earlier rise to a right to benefits). In the second place, his medical evidence would have to show that the deferred disability was due to the initial injury without intervening cause, and if the initial physical impairment was of a degree insufficient to produce concurrent incapacity for work, the probability of the intervention of other efficient causes, as producers of disability, arising during the long interval, would be so great as likely to defeat all except a most unusual case. Therefore, carriers have the opportunity to adjust the reserve for their contingent liabilities to bring the reserve into accord with the probability (or improbability) of successful recovery in such cases. Even in a case where the disability for work does not occur until three or four years after the accident, basis for doubt may be substantial where the initial physical impairment was slight, and particularly in hernia cases as any intervening nonindustrial strain may be of itself the efficient cause of subsequent disability.

Assuming, as appellant has suggested at the bottom of page 12 and top of page 13 of its brief, that an employee should file a claim for compensation *before* disability (incapacity for work) arises, if the claim should be controverted, a hearing held, and the accident in employment established, the deputy commissioner could not award the claimant *compensation for disability* because he could not show that he had suffered wage-loss in excess of 7 days. The most that the deputy commissioner could do under the circumstances would be to find the facts in relation to the injury, order the employer and carrier

to furnish any necessary operation and treatment, and further order the employer to pay any future compensation which might accrue during any period of future disability for work. Thus, neither the claimant nor the employer or carrier would be materially benefited in the anticipatory filing of the claim, before the right to money benefits has accrued. In such a situation where such an order is filed, the carrier's reserve position would not be changed one whit from the reserve position maintained otherwise. Mere filing of a claim and *holding the claim* until compensable disability is shown (another variant), also would not change the reserve position.

Plaintiff relies heavily upon *Fulton* v. *Hoage, deputy commissioner,* 77 F. (2d) 110, 64 App. D. C. 232. In that case the employee fell on a waxed floor on August 11, 1931, bruising her leg and breast, *reporting her injury to her employer at the time of her fall.* On November 4, 1931, when examined by a physician of her employer he found a malignant growth upon her breast. On November 25, 1931 (within 30 days of her discovery and knowledge of the cancerous growth) she gave written notice of injury to her employer; and on May 18, 1933, she quit work. On December 6, 1933, she filed claim for compensation. This claim was rejected by the deputy commissioner on three grounds; namely, (1) that written notice of injury was not given within 30 days after injury, and employer did not have knowledge of injury, (2) that claim was not filed within one year after injury or one year after date of last payment of compensation, and (3) that the disability (cancer) was not caused by injury. The court decided the case on grounds (1) and (2) only, agreeing with the deputy commissioner.

In respect to the compensation law this is a relatively "old" case (decided in 1935). Mutations in the application of the law since that date have occurred, resulting in greater refinement of interpretation in respect to the limitation provisions of the compensation law, so as to accomplish a greater measure of justice. This Honorable Court has recognized and given full effect to these mutations in *Potomac Electric Power Co.* v. *Cardillo, deputy commissioner,* 71 App. D. C. 163, 107 F. (2d) 962 (1939). In such earlier *Fulton* case, the

employee's theory in the appeal was inherently wrong—she appealed on the most insubstantial ground, and apparently did not raise nor urge the substantial and appropriate grounds which were considered in the later *Potomac Electric Power* case. She had continued to perform service from date of injury, August 11, 1931, to the date she quit work, May 18, 1933, receiving therefor *her usual wages and subsistence,* which were purely compensatory for services rendered. She tried to meet the year limit in section 13 (a) of the compensation law by resting upon the ground (wholly untenable) that the remuneration she had received after injury was, as a matter of law, *compensation for injuries,* and not wages, and asserted that her claim filed December 6, 1933, was timely filed within one year from date of last payment of compensation, thus believing that she had met the requirement of section 13 (a) of the Act. In respect to such contention, this Honorable Court was obviously correct on the record and the law in holding that she had received "wages" and not "compensation." As the reported decision shows that this was the only theory the employee had advanced, the court's decision (in rejection thereof) necessarily narrows the effect of this decision, but did not foreclose other considerations which came along later in the *Potomac* case.

In the interest of fair presentation of all factors in the *Fulton* case, we cannot help noting that the deputy commissioner who decided that case did not use critical analysis in applying the law; he apparently accepted surface appearances and roughly interpreted the words of the statute. He apparently could have found for the employee and it is believed this Honorable Court would have sustained him. It would have been on this reasoning: (1) The employee "reported her injury to the superintendent of the hospital at the time of her fall." (Oral reporting of an injury satisfies the "knowledge" basis for excusing written notice required by section 12 of the compensation Act—many decisions hold.) (2) She gave written notice *within* 30 days after she discovered the nature of her (latent) disability. (While oral "knowledge" of itself would be sufficient under section 12, nevertheless, she *also* gave written information to her employer.) (3)

She had no wage loss and could claim no compensation earlier than May 18, 1933, and her claim filed December 3, 1933, was within one year from date of *compensable* disability.

In cases of *latent* disability, written notice of injury is timely if given within 30 days from the date the employee *learns* of his condition, thus to inform the employer as to the *"nature* and *cause"* of injury, a requirement which is specified in the notice section of the law (sec. 12 (b)).

The mutations in the application of the law in respect to time limitations affecting the filing of claim for compensation are these: (1) where the disability is *latent, hidden, or undiscovered,* whether the employee is disabled for work or not, the limitation does not run until *discovery* takes place; and (2) where injury occurs but is *not followed by disability for work* (as defined in section 2 (10)), then the claim may be filed when disability (that is, *compensable disability*) does arise. The bar of limitations, as the courts frequently observe in compensation cases, was not intended to ensnare or trap unwary claimants.

In *latent* disability cases, the bar would be a perfect trap for a hapless disabled workman who should learn that he suffers a brain tumor which has resulted from an industrial injury of more than a year's standing.

In *delayed* disability cases (other than *latent* cases) the employee is informed by reading the compensation law that claim may be filed "at any time *after the first seven days of disability following* an injury" (sec. 19 (a)); that "disability" means "incapacity because of injury to earn * * * wages" (sec. 2 (10)); that "no compensation shall be allowed for the first seven days of the disability" (sec. 6 (a)); that it is the "right to compensation for *disability*" (not "injury"), which the year limit affects (sec. 13 (a)); and that his right is to receive "compensation," which is defined as money benefits (sec. 2 (12)).

To require the employee to file claim within one year from date of the *accident, irrespective of any subsequent ensuing compensable disability,* would seem to justify characterizing the above quoted portions of the statute as a form of dissemblance, snaring those who would believe and rely upon

those words. Even a remote possibility of such effect obviously should be avoided. Moreover, approaching the question of interpretation from the direct angle of the employee's own claim problem, the employee reasonably would be expected not to think of filing a claim *until he had something to claim.* That is a most natural impulse. He might, with perfect logic, reason that if he filed a claim *before* he had right to payments, his claim must certainly be rejected, and he would have to do it all over again, whenever he should have a right to the money benefits.

Consider also another trap for the unwary. An employer having the intention to deprive his employee of compensation (or wholly unwittingly without such intention), might continue the employee on the pay roll, at work and with no wage loss to the employee (no "disability" as defined in the statute) until just over one year elapses from date of the accident. The hapless employee who has not been stimulated to action by a wage-loss, and knowing of nothing to claim, would certainly receive a rude shock to find the bar of limitations athwart his "right to compensation," even though on appearances he had no "right to compensation" during this interval. (Perhaps the employee in the *Fulton* case received such a shock, for she worked and received wages after the accident.)

From every angle of approach, justice would seem to require a construction of section 13 (a), consistent with other parts of the statute; that is, to have the bar apply only from the date *compensable* disability arises in cases such as the present one.

CONCLUSION

The employee in the present case filed his claim within one year from the time his right to compensation for disability accrued. His action was timely as to section 13 (a) of the compensation law, and was consistent with other integrated sections of the law. This Honorable Court has previously held that a claim is not barred under section 13 (a) of the compensation law if it is filed within one year from the date when *compensable injury* occurs; that is, that point of time from and after which the employee has the right to claim compensation for his disability.

It is respectfully urged that the judgment and order of the court below, dismissing the complaint, should be affirmed.

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